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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 779.

ELADE REALTY CORPORATION,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF.

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THE COURT PRESS, N. Y. C.

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By its brief in opposition, respondent has not gainsaid the substantial importance of the questions presented (pet. 4 and 5, resp. brief 2) which were considered difficult by the Circuit Court of Appeals.

Nor has respondent's argument been addressed to the basic points urged by petitioner.

Referring to Petitioner's Point I.

On page 9, under paragraph 2, of respondent's brief, it is stated:

> "In other words, petitioner argues that, although it was always unlawful to sell at a higher price than that fixed in the application, and although, long before petitioner sold its houses, it was informed that such an unlawful sale would constitute a crime, nevertheless it should still be considered immune from criminal prosecution."

Petitioner presented no such argument.

Since this proceeding deals with a criminal appeal, it is assumed that the word "unlawful", as used by the respondent, connotes a criminal sanction upon violation of a regulation. But, as respondent recognizes, no law, regulation or order existed until after priority was granted and the houses erected which made it a crime for the builder to sell above the price stated in his application. Sale of a house at a price fixed by petitioner was not one of the conditions imposed by Preference Rating Order P-55 in effect before February 10, 1943 (Sec. 955.4, (h) Violations; Pet. brief p. 44), nor was petitioner affected by the Preference Rating Order P-55 in effect after February 10, 1943, which provided:

> "1) Effect on Outstanding Orders. This order shall not affect serially numbered P-55 orders issued prior to February 10, 1943." (Pet. brief App. C, p. 48)

Furthermore, the subsequent imposition of a criminal penalty constituted a new condition which neither petitioner nor the Government envisioned at the time of the filing of the application, the issuance of a priority and the completion of the houses.

Clearly, petitioner's property is taken without due process when petitioner is deterred from selling the same (at any price) for fear of the imposition of a criminal penalty arising out of a regulation promulgated after he had made his bargain. It is submitted, such subsequent regulation cannot apply to petitioner.

Referring to Petitioner's Point II.

In an attempted refutation of petitioner's argument that no reasonable relationship exists between a re-

striction on the sales price of the house to the public at large and the purposes intended and objects sought under the Second War Act, respondent asserts (Res. brief 7):

> "* * * if scarce materials were to be used only for inexpensive houses, it necessarily followed that less materials would be used per house, and thus more houses built with the materials available."

But the regulation covers that situation directly. Preference Rating Order P-55, section 955.4 (d) provides:

> "Restrictions on use of preference rating—(1) Restrictions on the builder:
>
> (i) The Builder may apply the preference rating hereby assigned only to those *quantities* and *kinds* of Defense Housing Material specifically authorized for such rating by the Director of Industry Operations on the copy of the Application returned to the Builder." (Pet. brief, Appendix B, p. 41.) (Italics supplied.)

Obviously, it was wholly unnecessary to adopt a remote, indirect and inefficacious device of restricting the sales price to get the most out of limited materials.

Respondent further argues that even though the houses concededly could be sold to the public at large, "* * * it was nevertheless necessary, in order to make housing available to defense workers, that the houses on the market be within the financial reach of such workers * * *" (Res. brief 8). But the builder had "agreed to give either exclusive or preferential occupancy to defense workers at the maximum rental"

(Res. brief 3) and the houses actually had been rented to war workers (R. 31) who occupied them to be near the defense plant vicinity in order to produce war materials; and that occupancy was protected by the rent regulations for housing of the Office of Price Administration (8 F. R. 13814, Sec. 4 (f)). The war worker's status was temporary, but his occupancy was nevertheless permanently protected. Sales did not take place until a year and a half after completion and renting to war workers. An outside purchaser took subject to and could not impair that occupancy or the maximum rental required to be paid. Furthermore, encumbered by war worker occupancy and possession, the price of the house was adversely affected and necessarily remained within the financial reach of the war worker if he desired permanent occupancy through fee ownership.

CONCLUSION.

It is respectfully submitted that the petition should be granted.

Respectfully submitted,

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Attorney for Petitioner.

New York, N. Y.,
January 15, 1947.